Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of

Implementation of the Satellite Home
Viewer Improvement Act of 1999

CS Docket No. 99-363

COMMENTS OF
THE ASSOCIATION OF LOCAL TELEVISION STATIONS, INC.

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Summary

Despite the Commission's seeming enthusiasm for a SWAT team like approach to enforcement of new subparagraph 325(b)(3)(C)(ii), the Commission should refrain from adopting detailed, intrusive rules to govern the negotiations between satellite carriers and local television stations. At most, the Commission should adopt broad, general rules, which confirm the statutory prohibitions and establish the Commission's oversight of the negotiating process. Congress never contemplated such a heavy-handed intrusion into the marketplace. It included a provision which includes only two narrow prohibitions. Only an exclusive agreement or a refusal to negotiate in good faith are forbidden. Neither prohibition may be implemented in a fashion which defeats this basic purpose of Section 325. Furthermore, no reason exists to do so. Local television stations are saddled with no disincentive to grant retransmission consent. No characteristic of the marketplace gives local television stations any bargaining advantage *vis-a-vis* satellite carriers. No history of frustrated negotiations exists. The Commission, therefore, should tread lightly and overcome the temptation to adopt detailed, intrusive rules to implement the new provision.

In particular, the Commission has no authority to compel agreement or impose terms on the parties. In establishing the retransmission consent provision, Congress intended to permit stations to withhold consent for the retransmission of their signals. Requiring a local television station to grant retransmission consent to a satellite carrier would read the section as a whole out of existence. Finally, the Commission should not become the retransmission consent "rate court." The potential administrative burden would be intolerable. More to the point, Congress intended to leave the price, terms,

and conditions of retransmission consent negotiations to the marketplace, rather than government rate setting. Therefore, the Commission's authority stops at the point of compelling parties to negotiate.

Additionally, before the Commission intervenes, it must be presented with a *bona fide* complaint which provides sufficient reason for additional inquiry. A meaningful burden must be placed on the complainant to show the need to go forward, as well as the ultimate proof that a violation occurred. Otherwise, the complaint itself then becomes a less than subtle form of intimidation by a satellite carrier, employed in the hope of driving the price below a marketplace or compensatory level. Therefore, the complaint process must not be structured to encourage complaints.

The duty to negotiate in good faith should apply to both parties in a retransmission consent negotiation. With respect to satellite carriers, this is not a situation where either party has any inherent bargaining advantage. It is not a situation where either party has any incentive to resist making an agreement. It is not a situation where the marketplace may be characterized as other than competitive. Therefore, placing an equal burden on both sides to negotiate in good faith makes sense.

Finally, no reason exists to require separate retransmission consent negotiations or agreements when two stations in the same market share a common owner. First, duopolies do not possess sufficient market power to exert anticompetitive pressure in the local market. Second, in adopting the retransmission consent provision, Congress envisioned that local television stations might seek to assure carriage of other program channels in lieu of cash consideration for the right to retransmit their signals.

ALTV, therefore, urges the Commission to confine its actions in this proceeding to those which are legally authorized and factually justified. This is no time for the Commission to embark on an unauthorized, unwarranted crusade to promote competition to cable television by insisting that local television stations subsidize satellite carriers.

Moreover, Congress intended that local television stations be compensated for their signals in a manner which reflects the value of their signals to MVPDs. It never suggested that satellite carriers be insulated from the marketplace it created to assure stations the opportunity to secure just compensation. ALTV, therefore, submits that the Commission refrain from adopting any substantive or procedural rule which would defeat the full intent of Section 325 or handicap local television stations in their efforts to maintain a high quality, ubiquitous, free video program service for all viewers.

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In this proceeding the Commission appears poised to don the striped shirt of a referee, menacingly grasp the yellow flag in its pocket, and range freely amidst and within retransmission consent negotiations, ready to penalize the slightest flinch as "illegal procedure." The Association of Local Television Stations, Inc. ("ALTV"), respectfully submits that a more measured response is in order.[1] Only when the players actually go out of bounds should the Commission step in and insist that play remain in bounds. Anything more intrusive would be epitomize the sort of regulatory solution to a non-existent problem considered anathema by reviewing courts.[2] Nothing suggests that a marketplace failure is imminent. Furthermore, Congress in no way invited the Commission to act in a heavy-handed fashion. ALTV, therefore, urges restraint.

In light of the legal limits and marketplace characteristics set forth below, the Commission should refrain from adopting detailed, intrusive rules to govern the negotiations between satellite carriers and local television stations. At most the Commission should adopt broad, general rules, which confirm the statutory prohibitions and establish the Commission's oversight of the negotiating process, as follows:

- No elaborate analytical framework like that employed in enforcing the collective bargaining obligations of employers and unions under the Taft-Hartley Act should be adopted.
- No detailed regulations like those applicable to incumbent local exchange carriers (ILECs) or like the cable program access rules defining specific actions which would be considered violations of a local television station's obligation to negotiate in good faith should be adopted.
- Any definition of good faith adopted by the Commission should do no more than reflect basic contract law standards of good faith.
- The duty to *negotiate* in good faith should not be stretched into a duty to reach agreement or to authorize the Commission to set the price, terms, or conditions of retransmission consent agreements.
- The rules should apply the duty to negotiate in good faith to the satellite carrier as well as the local television station.

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[1] ALTV is a non profit, incorporated association of local broadcast television stations. ALTV's membership is limited to stations not affiliated with the ABC, CBS, or NBC television networks.

[2] *Home Box Office v. FCC*, 507 F. 2d 9 (D.C. Cir. 1977).

- The burden of proof in any enforcement proceeding should remain on the complainant.
- No rule should prohibit a common owner of two localtelevision stations in the same market from negotiating a joint retransmission consent agreement.

I. The Commission Ought Refrain from Adopting a Detailed, Invasive Regulatory Scheme to Implement Section 325(B)(3)(C)(ii).

This proceeding is one in which the Commission may fall victim to a one dimensional analysis unworthy of rational decision making and blatantly at odds with its statutory mandate. A blind, singular pursuit of competition to cable -- as critical as that goal may be -- might well drive the Commission to adopt such an imposing regulatory scheme to enforce the statute that local television stations will be bludgeoned into granting retransmission consent to satellite carriers at highly discounted, noncompensatory prices or other patently unfavorable terms. Such an approach would fail to take into account the larger public interest picture and the broader responsibilities laid on the Commission in Section 325 and the Communications Act as a whole. Therefore, ALTV urges the Commission to step back and look not only at the new clause in Section 325, but also at the facts, neither of which justifies a detailed, invasive regulatory scheme to implement new clause (ii) of subparagraph (C) of paragraph (3) of subsection (b) of section 325.[3]

A. Detailed Standards Should Be Avoided in Favor of the Broad, General Proscriptions in the Statute.

ALTV at this time submits that the Commission should adopt a new provision in its satellite rules to implement Section 325(b)(3)(C)(ii). The focus of Congressional concern in adopting Section 325(b)(3)(C)(ii) was the threat to *satellite carriers'* efforts to develop local-into-local service in the event local television stations attempted to hide behind exclusive retransmission consent agreements or simply refused to negotiate with satellite carriers concerning retransmission consent. As Senator Kohl observed when the Senate passed the bill, the exclusivity provision had its genesis in "the belief that there exists unequal bargaining positions between the broadcasters and the *satellite companies*." 145 Cong. Rec. S15017 (daily ed. November 19, 1999)(statement of Sen. Kohl) [emphasis supplied]. No such threat has been perceived with respect to negotiations between cable operators or other MVPDs and local television stations. With respect to cable systems, local television stations have neither the bargaining power nor the incentive to refuse to negotiate in good faith. (As noted *infra*, and with due respect to Congress, ALTV would challenge the notion that local television stations have any such incentives or bargaining power *vis-a-vis* satellite carriers.) Cable systems remain local monopolies with enormous market and bargaining power. With in excess of 60 per cent penetration in most areas, they are an essential lifeline for local television stations. Indeed, the concern has been that cable systems would use their leverage in the market to extract exclusive retransmission agreements from local stations, thereby depriving potential competitors of access to the local station's signal. The Commission, therefore adopted a prohibition on exclusive retransmission consent agreements between local television stations and MVPDs. 47 CFR §76.64(m). Therefore, the Commission in the present proceeding would follow a better lead to adopt rules which primarily address Congress's concern about implementation of local-into-local service.

Despite the Commission's seeming enthusiasm for a SWAT team like approach to enforcement of new subparagraph 325(b)(3)(C)(ii), Congress never contemplated such a heavy-handed intrusion into the marketplace. It included a provision which includes only two narrow prohibitions. Only an exclusive agreement or a refusal to negotiate in good faith are forbidden. Even these prohibitions are included in and limited by a section designed primarily to assure that local television stations are compensated for the value of their signals to MVPDs. Neither prohibition may be implemented in a fashion which defeats this basic purpose of Section 325. Furthermore, no reason exists to do so. Local television stations are saddled with no disincentive to grant retransmission consent. No characteristic of the marketplace gives local television stations any bargaining advantage *vis-a-vis* satellite carriers. No history of frustrated negotiations exists. The Commission, therefore, should tread lightly and overcome the temptation to adopt detailed, intrusive rules to implement the new provision.

1. The Mandate of the Statute Is Tightly Circumscribed.

a. Section 325(b)(3)(C)(ii) Does Not Overwrite the Overarching Purpose of Section 325.

Congress granted the Commission only limited supervisory authority over retransmission consent negotiations in the context of a provision established primarily to assure that local television stations were compensated properly for the use of their signals by MVPDs. At the outset, ALTV respectfully reminds the Commission that new paragraph (b)(3)(C) of Section 325 must not be construed to undermine the purpose of the section as a whole.

The Commission properly is concerned about promoting competition to cable television.[4] No one, least of all ALTV, would quarrel with instilling new competition into a video marketplace where cable continues to enjoy near monopoly (and monopsony) dominance. However, ALTV is concerned that the Commission has lost sight of the fundamental, overarching purpose of Section 325. In adopting the fundamental retransmission consent requirement, Congress sought to assure local television stations the opportunity to secure the compensation for the value of their signal to MVPDs. Thus, focusing then on cable television systems' use of the signals of local television stations, the Senate report accompanying the retransmission consent provision ultimately enacted stated:

> Broadcast signals, particularly local broadcast signals, remain the most popular programming carried on cable systems, representing roughly two-thirds of the viewing time on the average cable system. It follows logically, therefore, that a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals.[5]

The Senate Committee was troubled that, "cable systems use these signals without having to seek the permission of the originating broadcaster or having to compensate the broadcaster for the value its product creates for the cable operator."[6] In view of this state of affairs, the committee did "not believe that public policy supports a system under which broadcasters

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Notice at ¶11.

S. Rpt. 102-92, 102d Cong., 2d Sess. 35 (1991).

Id.

in effect subsidize the establishment of their chief competitors.[7] Indeed, it concluded that the absence of retransmission consent with respect to cable "created a distortion in the video marketplace which threatens the future of over-the-air broadcasting."[8] Consequently, the Committee reported and Congress enacted Section 325(b)(1) which granted local television stations authority "to consent or withhold consent for the retransmission of [their] broadcast signal[s].[9] As the Senate Committee observed at the time, "The right to *control retransmission* and to *be compensated* for others use of their signals has always been a part of broadcast regulation."[10] The Commission's discretion, therefore, may take its cue from the narrower purpose of Section 325(b)(3)(C)(ii), but only within the policy perimeter established in Section 325 in its entirety, as clearly enunciated by Congress in 1927 and 1992. In short, local television stations' rights to control and gain compensation use of their signals must not be immolated in a short-sighted sacrifice at the altar of promoting competition to cable.

The same considerations which prompted Congress to amend the retransmission consent provision in 1992 are just as applicable to satellite carriers today. Local-into-local is valuable to satellite carriers. Already, they are selling the local-into-local component as a distinct service or tier at an additional charge. EchoStar, for example, charges $4.99 per month for its local-into-local service in Washington, D.C.[11] Already, satellite marketing reports show subscriber increases believed

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Id.

Id. In this regard, the Senate Committee also observed, "the intent ... is to ensure that our system of free broadcasting remain vibrant, and not be replaced by a system which requires consumers to pay for television service." *Id.* at 36.

Id. at 36.

Id. at 36. Indeed, the Committee also relied on the legislative history of the original retransmission consent requirement, stating that:

> Section 325 now provides, in pertinent part: "nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." The Committee believes, based on the legislative history of this provision, that Congress intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means. Indeed, in discussing what became section 325 during the debates on the Radio Act of 1927, Senator Dill made specific reference to the use of broadcast signals by the "wired wireless," which appears to have been a reference to an early form of cable transmission of radio signals.

Id. at 34 [citations omitted].

See Dish Network's website, http://www.dishnetwork.com/programming/local/dc.HTM, which offers four Washington, D.C., affiliates for $4.99 per month. Perhaps, it only states the painfully obvious to note that a station which received a nickel per subscriber per month would be leaving the satellite carrier with nearly 99 per cent of the fee charged the subscriber.

attributable to new local-into-local service[12] This, of course, is consistent with satellite carriers' testimony before Congress urging establishment of a new statutory copyright license for local-into-local service.[13] The purpose of the retransmission consent provision in such circumstances, again, is to permit local television stations to enjoy compensation for the extra value flowing to satellite carriers via use of their signals. New clause (ii), therefore, may not be interpreted or implemented so as to confound the operation or undermine the purposes of Section 325 as a whole.

b. That prohibitions in Section 325(b)(3)(C)(ii) are specific and limited.

Second, the prohibitions in the statute are limited. When confronting the abuses of the cable industry and telephone companies, Congress established a tight and detailed regulatory framework for program access and interconnection negotiations. However, in confronting the possibility that satellite carriers' local-into-local service might be hobbled by exclusive retransmission consent agreements between local television stations and other MVPDs or by local television stations' refusals to negotiate in good faith, Congress wisely took a less intrusive tack. It adopted two straightforward prohibitions. First, local television stations may not use exclusive retransmission consent arrangements with other MVPDs to shield themselves from retransmission consent negotiations with satellite carriers.[14] Second, they may not refuse to negotiate in good faith with satellite carriers for retransmission consent.[15] This provision neither requires identical or similar retransmission consent agreements among different MVPDs with respect to prices, terms, or conditions, nor even requires a station to reach an agreement with any MVPD. Section 325(b)(3)(C)(ii) states that "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different

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"Industry Divided Over Role of SHVIA in Big Dec. DBS Sales," *Communications Daily* (January 7, 2000). ALTV notes that this enhanced marketability has occurred even though the major satellite carriers fail to carry all local stations in the markets they serve with local-into-local service. This would suggest that the failure of a satellite carrier and an individual local television station or two to reach agreement granting the satellite carrier retransmission consent would not diminish the satellite carrier's ability to compete with cable to any material extent.

*See, e.g., Reauthorization of the Satellite Home Viewer Act: Hearings before the Subcomm. On Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce,*106th. Cong., 1st. Sess. 78-79 (1999)(statement of David K. Moskowitz).

Such a contract provision is inherently unlikely in light of the existing Commission prohibition of exclusive retransmission consent agreements between local television stations and MPVDs. 47 CFR §76.64(m). In light of the rule and inasmuch as cable systems via their monopoly position are the only entities capable today of exerting sufficient leverage to secure an exclusive retransmission consent agreement with a local television station, local television stations hardly are likely to have entered into any exclusive retransmission consent agreements at all.

47 U.S.C. §325(b)(3)(C)(ii).

terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations."[16] As the Commission notes, the Joint Explanatory Statement of the Conference simply confirms this language with no additional explanation or clarification *Notice* at 8. However, the colloquy between the chairman of the House Subcommittee on Telecommunications, Finance, and Consumer Protection, Congressman Billy Tauzin (R-LA) and the ranking member of the House Committee on Commerce, Congressman John Dingell (D-MI), is instructive.[17] Chairman Tauzin stated that

As long as a station does not refuse to deal with any particular distributor, a station's insistence on different terms and conditions in retransmission agreements based on marketplace considerations is not intended to be prohibited by this bill.[18] Thus, the provision in no way may be read to require local television stations to offer or agree with satellite carriers on retransmission consent prices, terms, and conditions like those agreed to between the local television station and a local cable system.

By its own terms, therefore, new clause (ii) is limited and offers no basis for an expansive interpretation which might justify an intrusive set of new regulations to implement the provision.

2. The Basic Features of the Marketplace Justify Nothing More Than Guarded Forbearance in Implementing and Enforcing the New Provision.

No basis exists in fact for adopting detailed, intrusive rules. Neither the incentives of the parties, the features of the marketplace, nor the behavior of the parties offers any reason to believe that local television stations will do anything other than negotiate readily in good faith to achieve appropriate retransmission consent agreements with satellite carriers.

a. Local television stations have strong incentives to grant retransmission consent to satellite carriers.

Broadcasters have strong incentives to grant retransmission rights. Unlike common carriers with considerable disincentives to permit interconnection or vertically-integrated cable networks with similarly strong disincentives to

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47 U.S.C. §325(b)(3)(C)(ii).

The colloquy is relevant and significant because it interprets the House language. Whereas the Conference Committee did not adopt the House language, the House language included a much broader prohibition. If the House language is explained and delimited by the colloquy, then the same limitations define the narrower provision adopted by the Conference Committee. As Senator Kohl observed:

> The original House language was predicated on the belief that there exists unequal bargaining positions between the broadcasters and the satellite companies. Our Senate bill took precisely the opposite approach. But our law comes out somewhere in the middle....

145 Cong. Rec. S15017 (daily ed. Nov. 19, 1999) (statement of Sen. Kohl).

145 Cong. Rec. H2320 (daily ed. April 27, 1999) (statement of Rep. Tauzin).

provide programming to a direct competitor, local television stations have every incentive to grant retransmission consent rights to satellite carriers.[19] Given the rapidly increasing number of satellite subscribers, no station will have any incentive to deprive satellite subscribers in their local markets of access to their signals on satellite. Indeed, ALTV fought to establish a "carry one, carry all" requirement to assure that all local television stations could insist on carriage in any market where a satellite carrier provided local-into-local service.[20] Furthermore, local television stations have no incentive to refuse retransmission consent to satellite carriers because satellite carriers today offer the best hope of providing true multichannel competition to local cable systems. In a truly competitive market, local television stations ultimately will have greater bargaining power and the prospect of negotiating more competitive and remunerative retransmission consent agreements with both satellite carriers and cable systems. Thus, local television stations have a strong dual incentive to grant retransmission consent to satellite carriers. Therefore, no detailed, intrusive rule or regulation is necessary to assure that normal business disincentives to agree prevent good faith negotiations between local television stations and satellite carriers.

b. Negotiations will take place in a competitive environment

Negotiations between satellite carriers and local television stations will take place in a competitive market. Multiple stations typically will be negotiating with multiple MVPDs (including at least two satellite carriers and one incumbent cable operator serving every area in its market). In ALTV's view, bargaining power will continue to reside with the "buyers" of retransmission consent. Again, local television stations will have every incentive to grant retransmission consent to all MVPDs in their markets. In any event, every MVPD as the conduit of video programming into each of its subscribers' homes, will be in a strong bargaining position. In any negotiation it will be risking the loss of one station's signal -- an event likely to have no effect on its subscriber base or revenue. The station on the other hand will be facing the loss of access to a meaningful percentage of its potential audience with a direct effect on its advertising revenues.[21] In such a competitive

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The Commission rightly has contrasted the ILEC-competitive carrier negotiations under Section 252 of the Act with normal commercial transactions:

> The section 252-negotiation process bears little resemblance to a typical commercial negotiation. The competitive carrier that seeks access to a shared loop has little, if nothing, to offer the incumbent in a negotiation. The incumbent, however, has control over the critical element the competitive LEC needs to compete.

Local Competition First Report and Order, 11 FCC Rcd 15499, 15566 (1996).

ALTV's member stations range from large market VHF affiliates of Fox, UPN, and WB, to small UHF independent stations. Whereas many of ALTV's member stations may elect to assure carriage via the carry one, carry all provision once it becomes effective in 2002, all stations will be securing carriage via retransmission consent until that time. After 2001, some will continue to elect retransmission consent.

The bargaining position of cable systems has increased significantly with clustering. When one cable operator controls access to as much as ninety per cent of the cable households in a market, as some now do, a local television station has almost

setting, no basis exists for a thumping regulatory response to protect satellite carriers from any undue bargaining power on the part of local television stations.

Furthermore, as the Commission is well aware, local television stations have been forbidden to enter into exclusive retransmission consent agreements with MVPDs for nearly seven years.[22] The likelihood that any such contracts or understandings are lurking in the dark shadows of any local television market is, therefore, nil. In other words, the Commission has no reason to anticipate that any existing retransmission consent agreements would bar a station from negotiating in good faith with a satellite carrier or any other MVPD.

In sum, neither the provisions of the new statute nor any compelling features of the marketplace offer any legal or factual foundation for adoption of detailed rules or standards to implement Section 325(b)(3)(C)(ii).

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no leverage. (The Commision places no limit on horizontal concentration by a cable system in a local market.) Satellite carriers also enjoy potential access to every household in a market. Therefore, as their subscriber bases increase in a market, their bargaining positions are strengthened.

See 47 CFR §76.64(m); *Notice* at ¶111.

3. No History or Record of Frustrated Negotiations Compels a Fierce Regulatory Response.

The Commission hardly is confronting a record of past or ongoing abuse which might justify an immediate and heavy regulatory response.[23] No satellite carrier as yet has claimed to be a wall flower at the retransmission consent dance.[24] In reality, much of the concern expressed by satellite carriers before Congress had nothing to do with concerns that local television station licensees would give them the cold shoulder. It involved fears that local television stations would demand greater compensation from satellite carriers than from cable operators.[25] One might easily understand that satellite carriers would like to pay the same "modest" compensation negotiated by monopolist cable operators. Again, however, Congress expressly refused to forbid different retransmission consent terms, conditions, or prices.[26] Furthermore, no local station has any incentive to gouge satellite carriers *vis-a-vis* price or any other term or condition of a retransmission consent agreement. As noted above, local television stations want to be carried. Local television stations benefit from a

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This contrasts starkly with what Congress saw with respect to the need for carry one, carry all requirements. Satellite carriers already had begun carrying local signals in some local markets, but had restricted their service to the affiliates of the three or four major networks. *See Reauthorization of the Satellite Home Viewer Act: Hearings before the Subcomm. On Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce,* 106th. Cong., 1st. Sess. 62 (1999)(statement of Al DeVaney).

Given the inordinate amount of publicity generated by a few isolated, as yet unsuccessful, broadcast/cable retransmission consent negotiations, ALTV finds it hard to imagine that any broadcast station resistance to negotiate in good faith with a satellite carrier would not have surfaced and drawn the harsh glare of public scrutiny. At Congressional hearings, some witnesses did express concern about potential bundling of retransmission consent rights with agreements to carry other programming. *Status of Competition Among Video Delivery Systems: Hearings before the Subcomm. On Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce,* 105th. Cong., 1st. Sess. 42 (1997)(statement of William F. Reddersen).

However, such forms of compensation were contemplated expressly by Congress in updating the retransmission consent provision in 1992. *See* Section I.B., *infra.* Indeed, such arrangements are typical today. One also might observe that satellite carriers and cable systems bundle program services in tiers or packages, thereby requiring consumers to pay for particular program services which they have no interest in receiving.

Reauthorization of the Satellite Home Viewer Act: Hearings before the Subcomm. On Telecommunications, Trade, and Consumer Protection of the House Comm. on Commerce, 106th. Cong., 1st. Sess. 82-83 (1999)(statement of David K. Moskowitz).

See Section I.A.1.b., *supra.*

strong multichannel competitor like satellite in the marketplace. Certainly stations will seek to secure full value for their signals from satellite carriers, but this is a far cry from stonewalling satellite carriers by refusing to negotiate in good faith for retransmission consent rights or standing behind exclusive retransmission consent agreements with other MVPDs.[27] Therefore, in the absence of evidence of a materially widespread breakdown in retransmission consent negotiations, the Commission has no mandate to engage in overly intrusive or detailed oversight of the marketplace.

Therefore, the Commission must look no farther than the general indicia of bad faith under basic contract law in placing any gloss on Section 325(b)(3)(C)(ii). As the Commission states, "good faith is defined in Uniform Commercial Code § 1-201(19) as 'honesty in fact in the conduct or transaction concerned.'" By the same token, "it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness."[28] ALTV submits that local television stations will enter negotiations honestly seeking mutually agreeable terms for retransmission of their stations' signals by satellite carriers. At times the negotiations may be tough; they may be slow. The recent imbroglio between Cox and Fox illustrates that even brinkmanship can occur in hard, but ultimately successful negotiations.[29] If, however, a local station were to enter into negotiations in bad faith *I.e.*, with no honest intention to reach agreement), its dilatory tactics would become apparent soon enough.[30]

In view of the above, the broad, general provisions in new clause (ii) with no more than the gloss of basic contract law would provide an adequate and adequately limited regulatory response to the legal and factual considerations now confronting the Commission in this proceeding.

B. Section 325(b)(3)(C)(ii) May Not Be Read to Require a Local Television Station and a Satellite Carrier to Reach Agreement.

Under the new provision, the Commission has no authority to compel agreement or impose terms on the parties. It may not consider a failure to reach agreement either a violation of the provision or as conclusive evidence of bad faith on the part of a

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Again, in light of the fundamental purpose of the retransmission consent provision to provide stations an opportunity to secure compensation for the value of their signals, the Commission must avoid imposing regulations which hinder local television stations ability to negotiate in any manner not expressly contemplated by the limitation in Section 325(b)(3)(C)(ii).

Restatement (Second) of the Law, Contracts, §205 (1981).

"Retrans wreaks havoc," *Broadcasting & Cable* (January 10, 2000) at 12; *but see* "Fox and Reach Retransmission Agreement," *Communications Daily* (January 10, 2000) at 7.

For example, outright refusals to meet, failure to designate a negotiator with authority to speak on behalf of the company at critical phases of the discussions, or regularly failing to show up at scheduled meetings might provide evidence of bad faith. On the other hand, as set forth, *infra*, the inability to reach agreement in no way evidences a failure to negotiate in good faith.

local television station. Again, Chairman Tauzin in his colloquy with the ranking member states that the ranking member is correct in his assertion that "if a station negotiates in good faith with a distributor, the failure to reach an agreement with that distributor would not constitute a discriminatory act that is intended to be barred by this section.[31] Again, if the more stringent and broader House provision rejected by the Conference Committee cannot be read to require an agreement between a local television station and a satellite distributor, then the much narrower provision adopted by the Conference Committee may not be read to impose this much more demanding requirement.[32]

Furthermore, in establishing the retransmission consent provision, Congress intended to permit stations to withhold consent for the retransmission of their signals. As stated in the Senate Commerce Committee report accompanying the retransmission consent provision in the 1992 Cable Act, Section 325(b)(1) granted local television stations the authority "to consent or *withhold consent* for the retransmission" of their signals.[33] If Congress had intended to guarantee that local television stations grant retransmission consent, it easily could have left the matter to the compulsory copyright license already in place. Even if Congress had wanted to compel grants of retransmission consent, but also see that stations were compensated, it could have adopted a compulsory license like that in section 114 of the Copyright Act. Section 114 provides a compulsory license, but establishes a minimum royalty, which governs in the event the parties cannot reach agreement on a negotiated rate.[34] Congress was fully aware of the cable compulsory license (as well as the section 114 license) when it amended section 325 in 1992 with respect to MVPDs. Whereas it did not alter the cable compulsory license, it expressly intended Section 325 to operate in conjunction with the cable compulsory license.[35] Congress in essence created a new marketplace in which stations and MPVDs would negotiate business deals for retransmission consent, unfettered by governmental constraints or guarantees. Thus, the Senate report stated:

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145 Cong. Rec. H2320 (daily ed. April 27, 1999) (statement of Rep. Dingell)

The obligation placed on stations by the statute is, perhaps, analogous, to the obligation created by a preliminary agreement between two parties which requires them to make a good faith effort to reach a final agreement, In this type of agreement, "the parties are bound only to make a good faith effort to negotiate and agree upon the open terms and a final agreement; if they fail to reach such a final agreement after making a good faith effort to do so, there is no further obligation."*Adjustrite Systems, Inc. et al. v. Gab Business Services et al.,*145 F. 3d 543, 1998 U.S. App. LEXIS 10644, 13-14 (2d. Cir. 1998).

S. Rpt. 102-92, 102d Cong., 2d Sess. 36 (1991). [emphasis supplied].

17 U.S.C §114.

S. Rpt. 102-92, 102d Cong., 2d Sess. 36 (1991).

It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals....[36]

Furthermore, interpreting the new provision to require a local television station to grant retransmission consent to a satellite carrier would read the section as a whole out of existence. A provision which requires an MVPD to obtain a station's consent, but then effectively forces the station to grant consent is self-negating. It would deny local television stations whatever bargaining power they may have left. Again, this essentially guts the basic retransmission requirement of any meaning. No such avenue of interpretation is open to the Commission.

Finally, the Commission should not become the retransmission consent "rate court." Given the number of individual station negotiations involved, the wide disparities in local market conditions and characteristics, and the complexities inherent in rate setting, the potential administrative burden would be intolerable. More to the point, of course, this clashes with Congressional intent to leave the price, terms, and conditions of retransmission consent negotiations to the marketplace, rather than government rate setting. As observed by the Senate committee, "[I]t is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations."[37]

ALTV submits, therefore, that the Commission's authority stops at the point of compelling parties to negotiate; it may not compel a successful negotiation. Moreover, it may not impose substantive terms on the parties.

II. Complainants Should Bear the Burden of Proof in Any Proceeding to Enforce Section 325(b)(3)(C)(ii).

No elaborate procedural structure is necessary to facilitate appropriate enforcement of clause(ii). As noted above, every reason exists to predict that local television stations will negotiate willingly with satellite carriers. Certainly, in a few instances negotiations may become protracted or may fail altogether, but this is no indicator of bad faith. As in any commercial negotiation, it may just be the product of a buyer and a seller with different perceptions of the value of the product. At the same time, none of this precludes the possibility that in some rare egregious cases, some clear indicia of bad faith may exist.[38] In such cases, the Commission ought intervene.[39]

Id.

Id.

See the examples described, *supra*, at n. 29.

Such intervention should be limited to compelling negotiations, not interposing price, terms, or conditions which the Commission considers acceptable. Again, Congress intended to create a market for retransmission consent rights; it eschewed a system which would have compelled consent under government dictated terms (like a compulsory copyright license). Furthermore, if the Commission ever set a price in even one instance, that price would become the bench mark by which all retransmission consent agreements would be judged. This necessarily would draw the parties to this predetermined price blessed with a government seal of approval. Thus, the market for retransmission consent would be stifled.

However, before the Commission intervenes, it must be presented with a *bona fide* complaint which provides sufficient reason for additional inquiry. A meaningful burden must be placed on the complainant to show the need to go forward, as well as the ultimate proof that a violation occurred. Otherwise, the Commission will be extending an open invitation to, if not outright encouraging, satellite carriers to whine and complain every time a local station resists granting retransmission consent to a satellite carrier at a bargain basement price. The complaint itself then becomes a less than subtle form of intimidation by a satellite carrier, employed in the hope of driving the price below a marketplace or compensatory level.[40] Again, nothing in the statute begins to suggest that Congress intended that stations grant retransmission consent at prices artificially constrained by governmental intervention. Indeed, as noted above, Congress expressly sought to avoid this type of subsidization of any MVPD by a local television station. Therefore, the complaint process must not be structured to encourage complaints. It should demand that complainants meet a meaningful burden of going forward and carry the ultimate burden of proof.

III. The Duty to Negotiate in Good Faith Should Apply Equally to Any MVPD in Retransmission Consent Negotiations with a Local Television Station.

The Commission has queried whether the duty to negotiate in good faith should apply to both parties to a retransmission consent negotiation.[41] ALTV submits that it should. As noted above with respect to satellite carriers, this is not a situation where either party has any inherent bargaining advantage. It is not a situation where either party has any incentive to resist making an agreement. It is not a situation where the marketplace may be characterized as other than competitive. Furthermore, in the case of cable systems, the continuing market dominance of cable places local television stations at a disadvantage.[42] Therefore, placing an equal burden on both sides to negotiate in good faith makes sense.

IV. No Rule Should Prohibit a Common Owner of Two Local Television Stations in the Same Market from Negotiating a Joint Retransmission Consent Agreement.

No reason exists to require separate retransmission consent negotiations or agreements when two stations in the same

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Given the potential for time-consuming discovery and potential exposure of confidential and proprietary information, a local station will have considerable incentive to capitulate to an unreasonable demand rather than assume the burden of litigating a complaint. For example, many local television stations retransmission consent agreements with cable systems contain strict confidentiality clauses. This would add to the burden of a complaint proceeding because appropriate protective orders would have to be sought and litigated. ALTV reminds the Commission that many individual local stations will be negotiating toe-to-toe with multibillion dollar national satellite companies. Battles of the titans like AOL Time Warner and Fox may occur, too, but in many instances, negotiations will involve just a local television station. The potential for a satellite carrier's attempting to win through intimidation is substantial in such cases.

Notice at ¶115.

As noted, *supra*, at n.22, clustering has served to increase cable's bargaining advantage over local television stations.

market share a common owner. First, the Commission determined in permitting such duopolies to exist that they would not possess sufficient market power to exert anticompetitive pressure in the local market.[43] Indeed, the new rules are designed to assure that newly formed duopolies do not pose a danger that the merged stations will garner excessive or anticompetitive levels of market power. Second, in adopting the retransmission consent provision, Congress envisioned that local television stations might seek to assure carriage of other program channels in lieu of cash consideration for the right to retransmit their signals. As pointed out in the Senate report:

Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels,*or the right to program an additional channel on a cable system*[44]

Therefore, a requirement that commonly owned stations in the same market be the subject of separate negotiations and agreements would clash with Congressional intent and the Commission's own appreciation of the market position of duopoly stations.

V. Conclusion

ALTV, therefore, urges the Commission to confine its actions in this proceeding to those which are legally authorized and factually justified. This is no time for the Commission to embark on an unauthorized, unwarranted crusade to promote competition to cable television by insisting that local television stations subsidize satellite carriers. Many local television stations already stand to suffer from the delayed application of the new carry one, carry all requirement. Meanwhile, they are being stonewalled by cable operators with respect to carriage of their digital signals. They are facing enormous costs to build digital facilities which promise to generate little revenue in the near term. They are straining against increased competition from an ever expanding array of cable program services and dramatic increases in the number MVPD-served households, to say nothing of the internet.

Moreover, Congress intended that local television stations be compensated for their signals in a manner which reflects the value of their signals to MVPDs. It never suggested that satellite carriers be insulated from the marketplace it created to assure stations the opportunity to secure just compensation. ALTV, therefore, submits that the Commission refrain from adopting any substantive or procedural rule which would defeat the full intent of Section 325 or handicap local television stations in their efforts to maintain a high quality, ubiquitous, free video program service for all viewers.

Respectfully submitted,

Report and Order, MM Dkt. No. 91-221, FCC 99-209 (released August 6, 1999) at ¶¶58, 70.

S. Rpt. 102-92, 102d Cong., 2d Sess. 35-36 (1991) (emphasis supplied).

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